Filed Mar 24, 1898.

Supreme Court of the United States.

A. B. SHEFFIELD, Receiver of First National Bank, of Detroit, Mich., Plaintiff in Error,

vs.

UNITED STATES NATIONAL BANK, of New York, Defendant in Error.

Brief for Defendant in Error, on Motion to Dismiss the Writ of Error.

W. C. Maybury,
John Harrington,
For Defendant in Error.

IN THE

Supreme Court of the United States.

S. R. COCKRILL, Receiver of First National Bank, of Little Rock, Plaintiff in Error,

v.

UNITED STATES NATIONAL BANK, of New York, Defendant in Error.

Brief for Defendant in Error, on Motion to Dismiss the Writ of Error.

This case has been three times tried by the Circuit Court. On the first and second trials, the judgment was against the United States National Bank. These were each reversed by the Court of Appeals for the Eighth Circuit. (64 Fed., 985-992 and 79 Fed., 296). The third trial resulted in a verdict and judgment for the United States National Bank. The receiver took a writ of error to the Court of Appeals, where this judgment was affirmed, on the authority of the two former opinions, and the receiver has brought error to this Court.

The United States National Bank, the defendant in error, has filed the following motion to dismiss the writ of error:

SUPREME COURT OF THE UNITED STATES.

S. R. COCKRILL, Receiver of First National Bank of Little Rock, Plaintiff in Error,

v.

UNITED STATES NATIONAL BANK, of New York, Defendant in Error.

The United States National Bank, defendant in error in this cause, moves the Court to dismiss the writ of error to this Court in this cause, because it says the jurisdiction of the Circuit Court in which the case was tried, depended alone upon the diverse citizenship of the parties and the judgment of the Court of Appeals is final, as will appear from a copy of the complaint in this case, and one of the notes sued on (all the notes being of like nature), as follows:

"UNITED STATES CIRCUIT COURT WESTERN DIVISION, EASTERN DISTRICT OF ARKANSAS.

UNITED STATES NATIONAL BANK, OF CITY OF NEW YORK,

v.

FIRST NATIONAL BANK OF LITTLE ROCK and STERLING R. COCKRILL, Receiver.

The said plaintiff United States National Bank, states that it is a corporation duly incorporated under the

laws of the United States and resident, located, and doing business in the city of New York, State of New York; that the defendant First National Bank of Little Rock is a corporation organized under the laws of the United States, resident and located and lately doing business in the ci y of Little Rock, in the Western Division of the Eastern District of Arkansas. Said defendant bank has become insolvent and the defendant, S. R. Cockrill, who is a citizen of Arkansas and resident of said city of Little Rock, has been appointed receiver of said bank.

On December 7, 1892, The City Electric Street Railway Company, a corporation organized and doing business under the laws of Arkansas, in the city of Little Rock, Arkansas, executed and delivered to G. R. Brown and H. G. Allis, citizens of the State of Missouri. its three promissory notes each for $5,000, payable four months from date, with interest at the rate of ten per cent per annum from maturity until paid. Said Brown and Allis afterwards indorsed and delivered said notes to the defendant First National Bank, and said bank before maturity and for a valuable consideration indorsed, rediscounted and delivered said notes to plaintiff.

That on December 7, 1892, the McCarthy & Joyce Co., a corporation resident in the city of Little Rock, Pulaski County, Arkansas, executed and delivered to James Joyce, a citizen of the State of Missouri, its two

promissory notes each for $5,000, payable to his order at four and five months respectively after date with interest from maturity at the rate of ten per cent per annum until paid; said Joyce afterwards indorsed said notes to the defendant First National Bank and said bank before maturity and for a valuable consideration indorsed, rediscounted and delivered said notes to plaintiff. Said notes were each at maturity presented at the First National Bank in Little Rock, Arkansas, for payment and payment being refused, they were each duly protested for nonpayment, the fees for which amounting to $25 were paid by plaintiff. Copies of the said notes with the indorsements thereon, are hereto attached, marked 1 to 5 inclusive, and made a part hereof. No part of said notes have been paid and the same have been presented to the receiver of said bank for allowance, which he refused to do.

Wherefore, plaintiff prays judgment for its debt and for all other relief.

RATCLIFFE & FLETCHER.
For Plaintiff."

"$5,000. 34,131.

"Little Rock, Ark., December 7, 1892.

"Four months after date we, or either of us, promise to pay to the order of G. R. Brown and H. G. Allis five thousand dollars for value received, negotiable and payable without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest at

the rate of ten per cent per annum from maturity until paid.

"CITY ELECTRIC STREET RAILWAY CO.,
"H. G. BRADFORD, Pt.,
"W. H. SUTTON, Secretary."
No. A, 73,485. Due April 7-10, 1893.

The following indorsements appear on the above note: "Geo. R. Brown, H. G. Allis, First National Bank, Little Rock, Ark., H. G. Allis, Pt. Pay W. D. Hearn, cashier, or order for collection, H. G. Hopkins, cashier. Protested for nonpayment, April 10, 1893, A. S. Reaves, Notary Public. Fees, $4.94."

The above is a copy of note marked 1 and its indorsements, which is attached to complaint.

W. C. RATCLIFFE,
JOHN FLETCHER,
For Defendant in Error.

It has been settled by this Court that in cases of this kind the jurisdiction must clearly and affirmatively appear from the statements contained in the complaint. The test is whether or not the complaint on its face would be good on demurrer or motion to dismiss for want of jurisdiction. No question subsequently raised in the progress of the case will give the Court jurisdiction.

Press Publishing Co. *v.* Monroe, 164 U. S., 105.

Ex parte Jones, 164 U. S., 691.

Colorado Central Consolidated Mining Co. *v.* Turck, 150 U. S., 138.

Metcalf *v.* Watertown, 128 U. S., 586.

Borgmeyer *v.* Idler, 159 U. S., 412.

State of Tennessee *v.* Union & Planters' Bank, 152 U. S., 454.

Postal Telegraph Cable Co. *v.* Alabama, 155 U. S., 482.

East Lake Land Co. *v.* Brown, 155 U. S., 488.

Chappel *v.* Waterworth, 155 U. S., 102.

St. Paul, M. & M. Ry. Co. *v.* St. Paul & N. P. R. Co., 68 Fed., 2.

Caples *v.* Texas & P. Ry. Co., 67 Fed., 9.

Pacific Gas Co. *v.* Ellert, 64 Fed., 421.

The complaint specifically sets forth the diverse citizenship of the parties and on that fact alone did the plaintiff in the trial Court base the jurisdiction of that Court.

The only issue presented by the complaint is one of fact as to the indorsement of the notes sued upon by the First National Bank and nonpayment. The determination of these facts for or against the plaintiff settles the question as to the liability of the bank, and ends the suit. There is nothing in this upon which a disputed question can arise as to the construction of the constitution or statutes of the United States.

Gold-Washing Co. *v.* Keyes, 96 U. S., 199.

Theurkauf *v.* Ireland, 27 Fed., 769.

Austin *v.* Gagan, 39 Fed., 626.

State of Iowa *v.* Chicago, M. & St. P. Ry. Co., 33 Fed., 391.

Starin *v.* New York City, 115 U. S., 248.

Murray *v.* Bluebird Mining Co., 45 Fed , 385.

Southern Pacific Ry. Co., *v.* Whittaker, 47 Fed., 529.

Butler *v.* Shafer, 67 Fed., 161.

In Starin *v.* New York, 115 U. S., 257, the court said:

"If, from the questions, it appears that some title, right, privilege or immunity on which the recovery depends, will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States, within the meaning of that term * * * otherwise not."

In the City of New Orleans *v.* Benjamin, 153 U. S., 423, this court said: "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction, upon the determination of which the result depends, then it is not a suit arising under the constitution. * * * The judicial power extends to all cases in law and equity arising under the constitu-

tion, but these are cases actually and not potentially arising, and jurisdiction cannot be assumed on mere hypothesis."

In State of Iowa *v.* Chicago, M. & St. P. Ry. Co., *supra*, Judge Shiras said: "The jurisdiction of this court either by original process, or by removal, in the class of cases under consideration, depends solely upon the fact that the controversy between the parties requires, for its *final determination*, the construction of some provision of the constitution, laws, or treaties of the United States, and the application thereof to the facts of the particular case, in such sense that the ruling thus made will materially affect the conclusion reached upon the controversy between the adversary parties to the litigation. Unless from the record it clearly appears that the *federal question must be met and decided, before the issue or issues in the particular cause can be finally disposed of*, it cannot be said that the matter in dispute arises under the constitution or laws of the United States within the meaning of the statute." (Italics are ours).

The fact that the receiver was made a party to the suit does not give jurisdiction. To every intent and purpose the suit was against the bank, and the only interest which the receiver has in the case is to represent the bank. When the questions involving the bank's liability are determined, but one result can follow.

The bank and receiver were both proper, though not necessary parties. The purpose of the suit, as shown by the complaint, was simply to establish the claim of the plaintiff against the First National Bank. Plaintiff seeks to acquire no lien nor to establish any preference, and the judgment in the case gives it none. It must simply take its place with other creditors whose claims are allowed or proven, and await the action of the comptroller in the distribution of the assets realized by the receiver.

Green *v.* Walkill National Bank, 7 Hun., 63.

"It is not sought to make the receiver liable, but to make the bank liable through the receiver."

Turner *v.* Bank of Keokuk, 26 Iowa, 562, 568.

The case of Tehan *v.* First National Bank, 39 Fed., 577, is in point. The court, in refusing to sustain the jurisdiction, said: "The nature of the action is the same as if the defendant Hayes were the receiver of a state bank or of an individual."

"The receiver has no prerogative right to be sued in the United States Court."

Bird's Exectuors *v.* Crockman, 2 Woods, 32.

Van Antwerp *v.* Hubbard, 8 Blackf., 282.

We have argued the case as if the complaint showed that the receiver was appointed by the Comptroller of the Currency. While it is a fact that the

receiver was thus appointed, the complaint does not show by whom the appointment was made.

Any court may appoint a receiver.

Wright *v.* Merchants Nat. Bank, 3 Cent. Law Journal, 351.

Thompson's Nat. Bank Cas., 321.

Irons *v.* Manufacturers Nat. Bank, 6 Biss., 301.

Respectfully submitted,

W. C. RATCLIFFE,
JOHN FLETCHER,
For Defendant in Error.